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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 638

JEW TEN, ALSO KNOWN AS GEORGE K. JUE, ALSO KNOWN AS JUE GAR KING, ALSO KNOWN AS CHOW KA KING, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7-14) is reported at 307 F.2d 832.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1962 (Pet. App. 7, 14). The petition for a writ of certiorari was filed on December 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 241(b) of the Immigration and Nationality Act provides that, where a judicial recommendation against deportation is made, the provisions of Section 241(a)(4), making convictions for crimes involving moral turpitude a ground of deportation, shall not apply. Section 241(a)(13) makes an independent basis for deportation the fact that an alien knowingly and for gain assists other aliens unlawfully to enter the United States. The question presented is whether a recommendation against deportation by the district court following petitioner's conviction for conspiring to smuggle aliens into the United States bars petitioner's deportation under section 241(a)(13) on an independent finding based on evidence that he committed the acts specified in that subsection.

STATUTES INVOLVED

Section 19 of the Immigration Act of February 5, 1917, 39 Stat. 874, 889-890, 8 U.S.C. (1940 ed.) 155(a), provided in pertinent part:

> That * * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any

alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * shall upon the warrant of the Secretary of Labor, be taken into custody and deported; * * * *Provided further*, That the provisions of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act * * *.

Section 20, Chapter 439 of the Act of June 28, 1940, 54 Stat. 670, 671-672, 8 U.S.C. (1940 ed.) 155(b), which amended section 19 of the Immigration Act of February 5, 1917, 39 Stat. 874, 8 U.S.C. (1940 ed.) 155(a), provided in pertinent part:

> Any alien of any of the classes specified in this subsection, in addition to aliens who are deportable under other provisions of law, shall, upon warrant of the Attorney General, be taken into custody and deported:
>
> (1) Any alien who, at any time within five years after entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or

aided any other alien to enter or to try to enter the United States in violation of law.

(2) Any alien who, at any time after entry, shall have on more than one occasion, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien or aliens to enter or to try to enter the United States in violation of law.

* * * * *

Section 241 of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U.S.C. 1251, provides in pertinent part:

(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

* * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

(13) prior to, or at the time of any entry or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

* * * * *

(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence * * * a recommendation to the Attorney General that such alien not be deported * * *. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

STATEMENT

Petitioner is an alien, a native and citizen of China, who was first admitted to the United States at the port of San Francisco, California, in 1919, as the lawful minor son of a domiciled merchant (I.R. 2, 57, 61).[1] He last entered the United States on August

[1] The proceedings before the Immigration and Naturalization Service are contained in six volumes, five of which contain consecutively numbered exhibits introduced at the deportation hearing.

10, 1950, at the port of Honolulu, Hawaii, as a returning permanent resident of the United States (I.R. 2, 61).

In 1954, petitioner was convicted in the United States District Court for the Northern District of California for conspiring with others from 1948 to 1953 to defraud the United States by assisting other aliens to enter the United States in violation of law (Tr. 2049; Pet. App. 15-16). On February 15, 1954, the court sentenced petitioner to imprisonment for a year and a day (Tr. 2069; Pet. App. 15-16). The following proceedings transpired (Tr. 2069-2073):

> Mr. ZIRPOLI [Counsel for petitioner]: Your Honor, may I also at this time, pursuant to the motion which I have heretofore filed, ask the Court to consider a recommendation that the defendant not be deported. * * *
>
> Mr. COLLINS [Counsel for the Immigration and Naturalization Service]: * * * [The Immigration and Naturalization Service] also wanted me to point out to Your Honor that Mr. Fue is subject to deportation under the two sub-sections of 8 U.S.C. 1251: 1251(a)(4) with which your Honor is concerned, and 1251(a)(13), which Your Honor's recommendation would in no way affect. * * *
>
> As I understand the statute, Your Honor's rec-

The exhibits are referred to as "Ex." along with the appropriate exhibit number. The sixth volume contains the proceedings before the Special Inquiry Officer and the Board of Immigration Appeals and is referred to as "I.R." The reporter's transcript of petitioner's 1954 criminal trial and related proceedings in the district court is contained in nineteen consecutively paginated volumes and is referred to as "Tr."

ommendation goes only to 1251(a)(4), conviction of a crime involving moral turpitude with a sentence of one year or over. As far as the mechanics of deportation, it would be much simpler for the Attorney General under 1251(a)(4), because the production of the judgment of this Court would be substantially all that would be required in the matter of proof.

Mr. ZIRPOLI: * * * I am cognizant of both of the provisions, and of course I respectfully submit that the only matter with relation to which Your Honor would have jurisdiction to act, of course, pertains to sub-section (4), and, therefore, the recommendation which Your Honor could make to the Attorney General would be a recommendation that he not be deported because of conviction of a crime involving moral turpitude.

And I am cognizant of Section (13), and that is of course the primary reason why I as earnestly as I can beseech the Court to make such a recommendation, because at least under Section (13) I have fighting chance for this man, and considering his past life and considering what I previously indicated to the Court, the constructive good that he has actually done in this community, I feel that it would not be wrong * * * to give him that fighting chance. And that is why I am earnestly begging the Court to recommend that he not be deported.

The COURT: * * * I believe that the Court is amply justified in recommending to the Attorney

> General that he not be deported, and that will be the recommendation that will accompany the defendant. . . .

The formal judgment, in addition to imposing sentence of a year and a day, "recommended to the Attorney General that the defendant be not deported" (Ex. 179; Pet. App. 16).

On February 15, 1954, the Immigration and Naturalization Service issued a warrant for petitioner's arrest and deportation on the ground that prior to and at the time of his entry into the United States he had knowingly and for gain encouraged and assisted other aliens to enter or try to enter the United States unlawfully, in violation of Section 241(a)(13) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(13), *supra* (I.R. 38-39; Pet. App. 20-21). A deportation hearing was conducted before a Special Inquiry Officer in San Francisco in May 1954 at which the transcript of petitioner's trial and other evidence was adduced (I.R. 63-330). On July 18, 1955, the Special Inquiry Officer found the petitioner "clearly deportable" on the grounds contained in the arrest warrant and ordered his deportation from the United States (I.R. 38-62). On December 20, 1955, the Board of Immigration Appeals dismissed the appeal (I.R. 2-5; Pet. App. 1-6), and petitioner was subsequently ordered deported to the Nationalist Republic of China (Formosa). On petition for review to the court of appeals pursuant to 8 U.S.C. (Supp. III) 1105a, the deportation order was affirmed (Pet. App. 7-14).

ARGUMENT

Petitioner contends (Pet. 5-9) that the judicial recommendation against deportation received under section 241(b) of the Immigration and Nationality Act of 1952, *supra*, operates to bar his deportation under section 241(a)(13) of the Act. He argues that section 241(b) was without limitation from the time of its initial enactment as part of the Immigration Act of 1917, *supra*, until passage of the Narcotic Control Act of 1956, at which time Congress added the last sentence of subsection (b) to make the subsection inoperative in those cases where aliens were charged with being deportable for drug addiction and narcotic offenses, and that by the 1956 Amendment Congress made it "obvious that the provisions of Section 241(b) are applicable to all other subsections of Section 241(a)". The short answer is that section 241(b) is specifically limited to relieving an alien from deportation on the grounds of conviction of a crime involving moral turpitude under section 241(a)(4), and has been so limited from the time of its initial inclusion in section 19 of the Immigration Act of 1917.

Section 241(b) provides that "(t)he provisions of subsection (a)(4) *of this section respecting the deportation of an alien convicted of a crime or crimes* shall not apply * * * if the court sentencing *such alien for such crime* shall make, at the time of first imposing judgment or passing sentence * * * * a recommendation to the Attorney General that such alien not be deported." (Emphasis supplied). Thus its application is in terms limited to the ground of deportation set forth in 241

(a)(4), *i.e.*, conviction of crimes involving moral turpitude. This was expressly recognized by the petitioner at the time the court recommended that he not be deported. See the Statement, *supra*, p. 7. Petitioner was not, however, ordered deported on the basis of his conviction of a crime. He was ordered deported because it was found as a fact that, within five years after an entry into the United States, he knowingly and for gain encouraged and assisted other aliens unlawfully to enter the United States. This fact was independently proved by the evidence and was not based on the mere fact of criminal conviction. Since the order of deportation did not rest upon grounds specified in subdivision (a)(4), the judicial recommendation against deportation had no application to petitioner's case. See *Lopez-Blanco* v. *Immigration and Naturalization Service*, 302 F. 2d 553 (C.A. 7).

The history of Section 241(b) confirms its explicit wording in restricting its application to deportations ordered on the grounds of conviction of a crime of moral turpitude. The first predecessor of Section 241(b), Section 19 of the Immigration Act of 1917, *supra*, pp. 2-3, stated explicitly that the provisions of the Act making conviction of a crime of moral turpitude grounds for deportation should not be applied if the sentencing judge recommended that the alien not be deported. The first provision dealing with deportation for assisting other aliens in entering the United States in violation of law was enacted twenty-three years later as Section 155(b) of an Act of June 28, 1940. Section 19 of the Immigration Act of 1917 was, at that time, maintained in effect without any significant change.

Section 241 of the Immigration and Nationality Act of 1952, the present statute, merely changed the wording of the provision in Section 19 of the 1917 statute by referring to "the provisions of subsection (a)(4)", dealing with deportation for commission of a crime of moral turpitude, rather than restating the substance of subsection (a)(4).

Petitioner's reliance on Section 301(*c*) of the Narcotic Control Act of 1956, 70 Stat. 567, 575, is misplaced. That section merely provided that Section 241(b) should not apply in the case of aliens "charged with being deportable from the United States under subsection (a)(11)" of Section 241 (*i.e.*, drug addiction and narcotic offenses). The amendment was enacted to clarify subsection (b) because at least two courts had held that a judicial recommendation against deportation would operate to bar deportation on the basis of a narcotic conviction although such a conviction furnished an independent ground for deportation under subsection (a)(11) of the Immigration Act of 1952 as well as a basis for deportation under subsection (a)(4), to which provision alone Section 241(b) referred. See S. Rep. No. 1997, 84th Cong., 2d Sess. at 21; Conf. Rep. No. 2546, 84th Cong., 2d Sess. Congress plainly did not intend, by negative implication and without any discussion, to extend broadly the scope of the provisions regarding judicial recommendations which had remained in the law, substantially unchanged, for almost forty years. Indeed, the source of confusion which caused the 1956 amendment—the fact that both subsections (a)(4) and (a)(11) made a *conviction* itself the basis for deportation—is not even present in a case

such as this one where *proscribed conduct* and not a criminal conviction is the grounds of deportation.

There is no conflict among the circuits. Neither *Rasmussen* v. *Robinson*, 163 F. 2d 732 (C.A. 3), nor *United States ex rel. Santarelli* v. *Hughes*, 116 F. 2d 613 (C.A. 3), the cases relied upon by petitioner to establish a conflict, has any bearing upon the issues decided by the court below, for in each of the cited cases the ground for deportation was conviction of a crime of moral turpitude.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1963.